No. 662

In the Supreme Court of the United States

October Term, 1913.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

v.

ATCHISON RAILWAY RECEIVING COMPANY AND ATCHISON TOP. AND SANTA FE RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA.

BRIEF FOR THE UNITED STATES.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 666.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

v.

AMERICAN RAILWAY EXPRESS COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The question is: Is the American Railway Express Company, a corporation engaged in the transportation of property by express, a "carrier by railroad" within the meaning of paragraphs (3) and (4) of Section 15 of the Interstate Commerce Act, as amended (41 Stat. 485)?

> (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon

complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route, where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water; and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any *carrier by railroad*, without its consent, to embrace in such route substantially less than the

entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

District Judges Ervin and Sibley concurring (Tr. 122), and Circuit Judge Bryan dissenting (Tr. 128), the District Court held American Railway Express Company is a *carrier by railroad* and accordingly enjoined (Tr. 121) the order of the Commission (Tr. 43) which directed that Company to establish and maintain through routes between all points in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, and New York, and all points on the line of that Company between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern Railway,

from Washington to and including Birmingham, on the other, with transfer between the American Railway Express Company and Southeastern Express Company at Washington.

Rates not in excess of those then in force between the points over the routes now in use were directed to apply.

The bill was filed by American Railway Express against the United States (Tr. 1). Seaboard Air Line Railway Company intervened as a party plaintiff (Tr. 46, 50). The Commission filed an answer (Tr. 92), which was adopted by the United States (Tr. 94). Southern Traffic League, a commercial organization, many of whose members use the facilities of the two express companies (Tr. 95), also intervened and, as a party defendant, prayed the dismissal of the bill. Southeastern Express Company also intervened (Tr. 101), and, as a party defendant, answered and prayed the dismissal of the bill (Tr. 120). On the first hearing, September 19, 1923, a temporary restraining order was issued (Tr. 121). Subsequently, on October 11, 1923, a preliminary injunction was issued and the order was suspended. (293 Fed. Rep. 31; Tr. 121, 122.)

In No. 666 the United States and the Commission jointly appealed. In No. 667 Southeastern Express Company appealed and in No. 668 Atlanta Freight Bureau appealed. The appeals were taken under Sections 2 and the second proviso of Section 5 of the Commerce Court Act (36 Stat. 542, 543, Ch. 309), *State of Tennessee* v. *United States*, 262 U. S. 318, and

that clause of Urgent Deficiencies Act (38 Stat. 220, Ch. 32) which provides, "The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court."

By stipulation in No. 667 the full transcript was printed. In No. 666 and No. 668 the appeal papers only were printed. With the exception of the appeal papers, the transcripts are triplicates. Unless otherwise indicated all references are to the printed transcript in No. 667.

II.

THE FACTS.

American Railway Express Company is a consolidation of the business and property of the American, Adams, Southern, and Wells Fargo express companies, which was authorized by the Commission on December 7, 1920 (59 I. C. C. 459). It was the only express company in operation from July 1, 1918, to May 1, 1921, when the Southeastern Express Company opened its offices (Tr. 19).

American Railway Express Company (hereinafter called American) operates generally throughout the continental United States, and prior to the organization of Southeastern Express Company (hereinafter called Southeastern) had practically a monopoly of the express business. It had entered into a uniform contract with practically all of the railroad and water-line carriers of the United States (Tr. 74, 91).

The activities of the Southeastern are confined practically to all of that territory lying south of the Ohio and Potomac rivers and east of the Mississippi. It has 2,651 stockholders, most of them Southern business men (Tr. 31). It operates over the Southern Railway, Mobile & Ohio, Tennessee Central, Washington, Baltimore & Annapolis, and Maryland & Pennsylvania companies, embracing approximately 9,900 miles of railroad (Tr. 19), which serve Washington, Louisville, Cincinnati, Evansville, Cairo, St. Louis, Memphis, New Orleans, and Jacksonville. Practically all other carriers in the United States are utilized by the American. In the Southern States it operates over more than 30,000 miles of railroad (Tr. 19).

The complaints prayed that the express companies be required to establish universal joint through routes, rates, classifications, rules, and regulations (Tr. 18). The issues in the two complaints are identical. The Atlanta Freight Bureau; Southern Traffic League; Merchants Association of Concord, N. C.; Asheville, N. C., Chamber of Commerce; Western North Carolina Chamber of Commerce; Mobile Chamber of Commerce; and United States Fisheries Association intervened and introduced evidence. Other similar organizations intervened but introduced no evidence. All intervenors are of the opinion that it will be in the public interest that all direct routes be made available, that the shippers should have the right to route, and that through competition the public will obtain better express

service (Tr. 18). On and after May 1, 1921, the American ceased to operate over many routes that it had formerly used and in lieu thereof routes its traffic over lines which it operates. It attempted in all instances to procure either the entire haul or the longest possible haul, and in certain instances traffic was handled over circuitous routes (Tr. 19).

Since its organization American has voluntarily established through routes and joint rates with the Southeastern which are known and designated as "established routes" (Tr. 30). The Commission found that the American transfers some traffic to the Southeastern at Washington for transportation to certain Southeastern points and that the American can not be heard to say that there are no established routes to such points in connection with the Southeastern at Washington (Tr. 31). Rule 3 of the express classification now in effect provides that shippers by designation in writing may route shipments by way of such established routes and transfer points as they may desire, but the American has refused to obey such routing instructions and disregards Rule 3 (Tr. 30). The Southeastern, on the other hand, has observed routing instructions and sought to eliminate the circuitous routing (Tr. 31).

This controversy relates principally to traffic moving between points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut, including New York City, and points in the Southeastern territory. Points of

receiving and delivery in that territory are known as "common," i. e., where a point is served by both companies; and "exclusive," i. e., where a point is served by only one.

The American operates each day to and through Southeastern territory over 235 car routes for which 313 cars are used daily, in which car lines operated wholly within this territory or from the border points to points wholly within the territory are not included. For its use 16 special express trains are operated daily, all of which handle express destined to Southeastern territory, and also 16 special trains in the reverse direction are operated from this territory to American exclusive points (Tr. 23). Evidence was introduced respecting routes and schedules covering practically the entire territory and numerous typical examples of routes and schedules are specifically pointed out in the report of the Commission (Tr. 23, 24, 25, 26).

About 15,000 tons of fish are taken each year from the waters in and adjacent to Southeastern territory. The members of the Southern Fisheries Association distribute these fish to various markets throughout the South, East, and West. From 60 to 70 per cent move via express. The Southeastern reduced its local rates on fresh fish and sea foods 10 per cent, and the members of the Southern Fisheries Association, whenever possible, use its services. Expedition is of great importance and Southern Fisheries Association, one of the complainants before the Commission, desires that all routes be open and that

the shipper have the right to route (Tr. 18). The Southeastern has attempted to concur in all the tariffs of the American with respect to rates and charges, rules and classifications, and provide for universal joint rates and routes. The American would not permit that, and by supplements effective May 1, 1921, limited its concurrence, and made applicable joint rates, charges, and routes only from exclusive offices of one company to exclusive offices of the other. The Southeastern was thus prevented participating in joint rates, charges, and routes between common points and exclusive American points, and between common points (Tr. 19).

The American claimed that the "common to exclusive office rule" is equitable because it prevents an express company from being short-hauled, eliminates another company's transfers at junction points, and minimizes the opportunity to route circuitously. The American shows that the Southeastern violates this rule a great many times each day and that a large number of these shipments are routed circuitously, resulting in delays of from 5 to 48 hours, and some times more. (Tr. 23.) The Commission found that express should be handled over reasonably direct routes, that if traffic were delivered to the Southeastern at a common point, and if there were a direct joint route, then it would not be unreasonable for the Southeastern to participate in such traffic. (Tr. 23.) The Commission further found that both companies would be on an equal footing if they competed for traffic destined to the other's exclusive

offices, but that they should be allowed to use only joint routes that are reasonably direct. (Tr. 23.)

The American claims that it is unreasonable, in view of its present service, to compel it to abandon any traffic to, or to share traffic with, the Southeastern. (Tr. 24.)

The Commission further stated that the testimony shows that the express service at common points has improved since the formation of the Southeastern, which is probably due to competition in service other than rates, as all the rates are under the block system, except the Southeastern's rates on fish. (Tr. 29.) Concluding, the Commission said: (Tr. 32):

> We are of the opinion and find that it is necessary and desirable in the public interest that additional reasonable direct through routes and joint rates shall be maintained between points on the lines of the American Railway Express Company and points on the lines of the Southeastern Express Company, regardless of the fact that one company may have a reasonable direct single-line route, or join in a reasonable direct joint route via another junction which allows it a longer haul; that the rates between any two points shall be the same regardless of the route over which the shipment may move or the number of lines over which it may travel; that joint through routes shall be established, in instances where they will result in reasonable direct routes, so that there will be at least two reasonable direct routes between such points, one of which shall be via the transfer point selected by the Southeastern

> Express Company and the other via the transfer point selected by the American Railway Express Company; and that the tariffs shall provide for the right of the shipper to designate the routing of express shipments over the routes established in accordance with these findings.

Compliance with the Commission's findings was left to conference between representatives, respectively, of the American and the Southeastern without satisfactory results. The subject then again came before the Commission and after a supplemental report the final order was entered which the District Court subsequently enjoined.

III.

THE INTERSTATE COMMERCE ACTS.

THE TERM "CARRIER BY RAILROAD" HAS A FIXED MEANING IN THE STATUTES AND ITS NON-INCLUSION OF EXPRESS COMPANIES IS OBVIOUS.

(A) THE CULLOM ACT OF 1887.

The Act to Regulate Commerce, approved February 4, 1887 (Ch. 104, 24 Stat. 379), did not include express companies. Section 1 provides, "That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, * * *." (Ch. 104, 24 Stat. 379).

Section 2. Unjust discrimination defined and forbidden: "Any common carrier subject to the provisions of this act" (24 Stat. 379).

Section 3. Undue or unreasonable preference or advantage forbidden: "Any common carrier subject to the provisions of this Act." Facilities for interchange of traffic: "Every common carrier subject to the provisions of this act" (24 Stat. 380).

Section 4. Long and short haul clause: "Any common carrier subject to the provisions of this act" (24 Stat. 380).

Section 5. Pooling of freights and divison of earnings forbidden: "Any common carrier subject to the provisions of this act" (24 Stat. 380).

Section 6. Printing and keeping open to public inspection schedules showing rates, fares, and charges: "Every common carrier subject to the provisions of this act" (24 Stat. 380). Freight carried through a foreign country to any place in the United States; printing and keeping open to public inspection schedules showing the rates: "Any common carrier subject to the provisions of this act" (24 Stat. 381). Filing of tariffs with the Commission, and changes therein: "Every common carrier subject to the provisions of this act" (24 Stat. 381).

Section 7. Continuous carriage of freight: "Any common carrier subject to the provisions of this act" (24 Stat. 382).

Section 8. Liability of common carriers for damages: "Any common carrier subject to the provisions of this act" (24 Stat. 382).

Section 9. Persons claiming to be damaged may elect either to complain to the Commission or bring suit in the United States courts: "Any common car-

rier subject to the provisions of this act" (24 Stat. 382).

Section 10. Penalties for violation of act: "Any common carrier subject to the provisions of this act" (24 Stat. 382).

Section 11. Penalty for false billing, etc., by carriers, their officers or agents: "Any common carrier subject to the provisions of this act" (25 Stat. 858). Penalty for false billing, etc., by shippers and other persons: "Any common carrier subject to the provisions of this act" (Ch. 382, 25 Stat. 858).

Section 12. Power and duties of Commission to inquire into business of carriers: "All common carriers subject to the provisions of this act" (24 Stat. 383).

Section 13. Complaints to the Commission against: "Any common carrier subject to the provisions of this act" (24 Stat. 384).

Section 16. Violation or refusal or neglect to obey order of the Commission: "Any common carrier, as defined in and subject to the provisions of this act" (24 Stat. 384).

Section 20. Commission may require annual reports: "All common carriers subject to the provisions of this act" (24 Stat. 386).

After describing in Section 1 "any common carrier or carriers" to which the provisions of the act shall apply, Congress adopted and used thereafter but one term to designate them.

(B) THE ELKINS ACT OF 1903.

An Act entitled "An Act to further regulate commerce," etc., approved February 19, 1903 (Ch. 708, 32 Stat. 847), provides that certain violations of the Act of 1887 shall constitute a misdemeanor "under said acts or under this act"; thus "the willful failure upon the part of any carrier subject to said acts to file and publish the tariffs" (Ch. 708, 32 Stat. 847). Rebating was also made unlawful "by any common carrier subject to said act to regulate commerce and the acts amendatory thereto" (32 Stat. 847). The penalty provisions included companies only and did not reach officers.

Section 3 provides for proceedings to enjoin or restrain departures from published rates and any discrimination prohibited by law and provides that whenever the Commission shall have reasonable ground for belief that "any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file," etc. (32 Stat. 848).

(C) THE HEPBURN ACT OF 1906.

The Act to amend the act entitled "An Act to regulate commerce," etc., approved June 29, 1906, enlarged section 1 so that the same now reads (Ch. 3591, 34 Stat. 584):

> That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad

* * * who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement, for a continuous carriage or shipment) * * *.

The term "common carrier" *as used in this act*, shall include express companies and sleeping car companies. The term "railroad," *as used in this act*, shall include all bridges and ferries * * * and also all the road in use * * * and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

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Wherever, therefore, the term "common carrier" subsequently appears in the act it includes the American Railway Express Company and the Southeastern Express Company. The comprehensive definition of the term "railroad" as used in the act immediately follows the provision which includes express companies within the term "common carrier."

Section 1 also provides, with certain exceptions, that "no common carrier subject to the provisions of this act" shall give any free pass or free transportation (34 Stat. 584). As applied to express companies, see *American Express Co.* v. *United States*, 212 U. S. 522.

Section 1 also forbids "any *railroad* company" to transport property owned by it and intended for its own use (34 Stat. 585). Obviously the "commodities clause" does not apply to express companies.

Section 1 also provides that "any common carrier subject to the provisions of this act," upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation shall construct, maintain, and operate upon reasonable terms a switch connection" (34 Stat. 585). It further provides that "If any common carrier shall fail to install and operate any such switch or connection as aforesaid" (34 Stat. 585) the shipper may make complaint to the Commission. Obviously that clause does not apply to express companies.

Section 6 of the Act to Regulate Commerce was amended by section 2 of the Hepburn Act (34 Stat. 586) and the term "That every common carrier subject to the provisions of this act shall file," etc.,

was retained. The section applies to the posting and publishing of tariffs, establishing through routes and joint rates, and changes and modifications of tariffs, etc. In one paragraph the terms "no carrier" and "any carrier" are used, and a proviso follows that whenever the word "carrier" occurs in this act it shall be held to mean "common carrier" (34 Stat. 587). Section 6 in its entirety obviously applies to express companies.

Section 1 of the Act of 1903 was also amended by the Hepburn Act (34 Stat. 587) so as to include not only "a corporation common carrier, subject to the Act to Regulate Commerce and the acts amendatory thereof," but it also includes "the transportation of any property in interstate or foreign commerce by any common carrier subject to the said Act to regulate commerce and the acts amendatory thereof" (34 Stat. 588), and "any persons, or any officer or director of any *corporation* subject to the provisions of this act, or the Act to regulate commerce and the acts amendatory thereof" (34 Stat. 588). This amendment is aimed at the failure to publish and file tariffs and the violation of published tariffs. Obviously it applies to express companies.

Section 15 of the Act of 1887 was amended by Section 4 of the Hepburn Act and authorized the Commission, upon complaint of "any common carrier" to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed as the maximum to be charged (34 Stat. 589). It further provides that the

Commission may determine divisions of rates and establish through routes and joint rates. It is not questioned that the section applies to express companies.

Section 16 of the Act of 1887 was amended by Section 5 of the Hepburn Act (34 Stat. 590) and provides that the Commission may award damages and make an order directing "the *carrier* to pay to the complainant" the sum to which he is entitled. In a suit to recover an award of damages it is provided that "all of the carriers parties to such order" may be joined as defendants (Ch. 3591, 34 Stat. 590). It is further provided that "If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money," application may be made to the court to enforce the order (34 Stat. 591).

Section 20 of the Act to Regulate Commerce was amended by Section 7 of the Hepburn Act (Ch. 3591, 34 Stat. 593), and provides "That the Commission is hereby authorized to require annual reports from all *common carriers subject to the provisions of this act*, and from the *owners of all railroads* engaged in interstate commerce as defined in this act * * *. The Commission may, in its discretion, * * * prescribe a period of time within which all *common carriers subject to the provisions of this act* shall have as near as may be a uniform system of accounts * * *" (34 Stat. 593). If "any carrier, person, or corporation subject to the provisions of this act shall fail to make and file said annual

reports within the time above specified, or within the time extended by the Commission," it shall forfeit to the United States the sum of $100 for each day it shall continue in default (34 Stat. 593). The Commission may also prescribe the forms of any and all accounts and records to be kept by "carriers subject to the provisions of this act" (34 Stat. 594). The Commission shall also have access to all accounts, records, and memoranda "kept by carriers subject to this act, and it shall be unlawful for such carriers to keep any other accounts * * *" (34 Stat. 594). Obviously these several provisions are as applicable to express companies as to railroad companies.

The provision in Section 20 as amended "That any *common carrier, railroad,* or *transportation company* receiving property for transportation" shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass (34 Stat. 595) is a decided departure from the previously used terms.

(D) THE COMMERCE COURT ACT OF 1910.

The Act to create a Commerce Court, approved June 18, 1910 (Ch. 309, 36 Stat. 539), further amends Section 1 of the Act to Regulate Commerce. The clause "The term 'common carrier' as used in this

act shall include express companies and sleeping car companies" (36 Stat. 545) was not changed. It also provided that "it shall be the duty of *every carrier subject to the provisions of this act* to provide and furnish such transportation upon reasonable request therefor," etc. The act also made it "the duty of all *common carriers subject to the provisions of this act* to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed" (36 Stat. 546).

Section 4 of the Act to regulate commerce was amended by Section 8 of the Commerce Court Act, and provided (36 Stat. 547) "That it shall be unlawful for *any common carrier subject to the provisions of this act* to charge or receive any greater compensation in the aggregate * * * for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance * * *."

While the designation of the carriers in the opening sentence remained unchanged, a very important clause was added which made a decisive distinction between a "*carrier by railroad*" and other carriers, thus: (36 Stat. 548) "Whenever a *carrier by railroad* shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be

found that such proposed increase rests upon changed conditions other than the elimination of water competition."

Here the specifically described *carrier by railroad* was designated as the object of special legislation to cure a well-known evil. Had the Congress intended to include express companies undoubtedly it would have used the term "common carrier." Ordinarily steamship lines carry the bulk and heavy commodities and few light packages; whereas, express companies carry small packages in great quantities and few of the bulk and heavy commodities. Obviously, therefore, by reduced rates, an express company could not drive a steamship line out of existence. The term "carrier by railroad" was deliberately intended to exclude express companies which, for the purpose of the Interstate Commerce Act, are included in the term "common carrier."

Section 6 of the Act to regulate commerce was amended by Section 9 of the Commerce Court Act (36 Stat. 548). It provided that "If *any common carrier subject to the provisions of this act*, after written request made upon the agent of such carrier * * * by any person or company for a written statement of the rate or charge applicable to a described shipment * * * shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission * * * the said carrier shall be liable to a penalty of two

hundred and fifty dollars." Immediately following is the provision that "It shall be the duty of every *carrier by railroad* to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; * * *." There again the words "carrier by railroad" are specially selected because, as is well known and the Court will take judicial notice of the fact, the larger volume of the articles carried by express are picked up at the factory, place of business, home, or other place of origin of the shipment and carried by the express company to the station. The express company could not post the names of agents on its wagons or at every point at which it may call for packages. Ordinarily the express company transacts little or no business with its shippers at the office of the railroad or steamship company as the actual carriage begins when the express company receives the package at its down-town office, or the factory, place of business, residence, or other place of origin of the package. Here again the term "carrier by railroad" was selected in order to exclude express companies.

Section 10 of the Act to Regulate Commerce was amended by Section 10 of the Commerce Court Act (36 Stat. 549). Section 10 provides penalties for violations of the act and while it retained the term "any common carrier subject to the provisions of

this Act," it added the words "or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation * * *" shall be guilty, etc. It further provides that "Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any *common carrier subject to the provisions of this Act*" shall make any false billing thereof, shall be deemed guilty of fraud (36 Stat. 549). The provision obviously applies to express companies.

Section 13 of the Act to Regulate Commerce was amended by Section 11 of the Commerce Court Act (36 Stat. 550). Section 13 provides for the filing of a complaint and uses the term "common carrier" throughout, which includes express companies.

Section 15 of the Act to Regulate Commerce was amended by Section 12 of the Commerce Court Act (36 Stat. 551) and retains the words "any common carrier or carriers subject to the provisions of this Act." Under the through route provisions the Commission shall not establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and *railroads* of a different character (36 Stat. 552).

That amendment contains the following provision (36 Stat. 552): "And in establishing such through

route the Commission shall not require any *company*, without its consent, to embrace in such route substantially less than the entire length of its *railroad* and of any intermediate *railroad* operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established." Immediately following are the words, "In all cases where at the time of delivery of property to *any railroad corporation being a common carrier*, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established," the shipper is given the right to designate in writing which of the routes he prefers. There is also the proviso that the shipper shall in all instances have the right to determine "where competing lines of *railroad* constitute portions of a through line or route," over which his freight shall be transported (36 Stat. 553).

After finishing with through routes and the routing of traffic thereover, the Congress, in taking up the subject of the unlawful solicitation of information relating to shipments or the destination thereof, returns to its repeatedly used term and provides "It shall be unlawful for any *common carrier subject to the provisions of this Act*" or any officer, * * * authorized by such common carrier to receive infor-

mation therefrom, etc. (36 Stat. 553), unlawfully to disclose, etc.

Section 16 of the Act to Regulate Commerce was amended by Section 13 of the Commerce Court Act (36 Stat. 554) and throughout uses the term "carrier."

Section 20 of the Act to Regulate Commerce was further amended by Section 14 of the Commerce Court Act (36 Stat. 555). In the amendment the use of the term "any carrier, person, or corporation, subject to the provisions of this Act" is continued.

(E) THE FEDERAL CONTROL ACTS.

The Federal Control Acts clearly distinguish between express companies and railroads. The Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916 (Ch. 418, 39 Stat. 619, 645), provides in Section 1 thereof, as follows:

> The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of *any system or systems of transportation*, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment or for such other purposes connected with the emergency as may be needful or desirable.

On December 26, 1917, President Wilson issued the proclamation (40 Stat. 1733) for Federal Control of Railroads highly sweeping in its terms. The

President did "take possession and assume control * * * of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and *consisting of railroads*, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by *steam or by electric power*, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines and all other equipment and appurtenances commonly used upon or operated as a part of such *rail or combined rail and water system of transporation* (40 Stat. 1734).

On March 21, 1918, the Federal Control Act was passed and provided that "the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree * * *," etc. (40 Stat. 451, Ch. 25). Compensation for the use thereof was based on the "average annual *railway* operating income" for the three years ended June 20, 1917.

On March 29, 1918, the President, by Proclamation, authorized the Director General to execute in the name of the President the provisions of the Federal Control Act (40 Stat. 1763).

That the words "Each and every system of transportation and the appurtenances thereof * * *

consisting of railroads, * * * engaged in general transportation, whether operated by *steam or by electric power,*" etc., did not include the American Railway Express Company is conclusively shown, not only by the Federal Control Act, but also by the subsequent proclamation of November 16, 1918 (40 Stat. 1889), wherein and whereby the President, under Section 1 of the Army Appropriation Act, *supra*, did "take possession and assume control * * * of that certain system of transportation called the American Railway Express Company and all of its appurtenances and property of every kind or nature, directly or indirectly, owned, leased, chartered, controlled, or used in the conduct of, or in connection with, its express business" (40 Stat. 1889).

By the proclamation the Director General was to control and operate the company under the proclamations of December 26, 1917, and March 29, 1918, and under the Federal Control Act, approved March 21, 1918 (40 Stat. 451). The Director General was further authorized to perform his duties to such extent as he should determine under the contract already made between the Director General and the American Railway Express Company, dated June 26, 1918.

Thus the Government itself divided railroad systems of transportation and American Railway Express Company. That course was consistent with legislation by Congress from the beginning.

(F) THE TRANSPORTATION ACT OF 1920.

The Transportation Act of 1920 (Ch. 91, 41 Stat. 456), which provided for the termination of Federal control of railroads and systems of transportation, and for further amendment of the Act to Regulate Commerce, provided, by Section 200 thereof, that Federal control shall terminate at 12.01 a. m., March 1, 1920, and the President shall not have or exercise any of the powers conferred upon him by the Federal Control Act relating "to the use or operation of railroads or systems of transportation" (41 Stat. 457). By section 204, which provides for reimbursement of deficits during Federal control (41 Stat. 460), the term "carrier" is defined to mean "a *carrier by railroad* which, during any part of the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control."

By section 209, which provides for guaranty to carriers after termination of Federal control (41 Stat. 464), it is provided that the term "carrier" means (1) "a *carrier by railroad* or partly by railroad and partly by water, whose *railroad* or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic or connected with a *railroad* at any time under Federal control; and (2) a *sleeping-car company* whose system of transportation is under Federal control at the time Federal control terminates" (41 Stat. 464).

In the act of 1906 the term "common carrier" includes "express companies and sleeping-car companies." Here the term "carrier" is defined to include "carrier by railroad" and "sleeping-car companies." The obviously deliberate non-inclusion of express companies is significant.

Paragraph (i) of Section 209 of the Transportation Act (41 Stat. 467) contains full and complete provisions for settlement with American Railway Express Company, and may be divided under the heads (1) Guaranty; (2) Adjustment and restatement of operating revenues and expenses; (3) Payments on account of express privileges; (4) Payment of operating income into public Treasury for revolving fund; (5) Certificate of amount due; (6) Appropriation; (7) Advances on account of guaranty; (8) Repayment of excess advances.

By Section 212, added February 26, 1921 (Ch. 72, 41 Stat. 1145), providing for making certifications under Section 204 or Section 209, the Commission, if not at the time able finally to determine the whole amount due under such section "to a *carrier* or the American Railway Express Company," may make its certificate for any amount definitely ascertained, etc. The same words were subsequently again used in the same section, clearly indicating a distinction between *carrier by railroad* and the American Railway Express Company.

Title III of the Transportation Act—Disputes between carriers and their employees and subordinate officials—provides (41 Stat. 469), by section 300,

that the term "carrier" includes "*any express company,* sleeping car company, and any *carrier by railroad* subject to the Interstate Commerce Act." If, as the learned District Court held, the term "carrier by railroad" includes American Railway Express Company, then why did Congress use the words "any express company, sleeping car company, and any *carrier by railroad?*"

Title IV—Amendments to Interstate Commerce Act—Section 400 amends Section 1 of the Interstate Commerce Act and provides (41 Stat. 474):

> (3) The term "common carrier" as used in this Act shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; *express companies;* sleeping car companies; * * *.

It also provides that wherever the word "carrier" is used in this act it shall be held to mean "common carrier."

Paragraph (4) provides (41 Stat. 475):

> (4) It shall be the duty of every *common carrier subject to this Act* engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to

establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

Paragraph (6) provides (41 Stat. 475):

> It is hereby made the duty of all *common carriers subject to the provisions of this Act* to establish, observe, and enforce just and reasonable classifications of property for transportation * * *.

Here the term "common carrier" clearly includes express companies as the term is so defined in paragraph (3). Section 402, which relates to car service, discards that term, thus:

> (10) The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property * * * by any *carrier by railroad* subject to this Act (41 Stat. 476).
>
> (11) It shall be the duty of every *carrier by railroad* subject to this Act to furnish safe and adequate car service, etc. (41 Stat. 476).
>
> (12) It shall also be the duty of every *carrier by railroad* to make just and reasonable distribution of cars for transportation of coal among coal mines served by it * * * (41 Stat. 476).

If, according to the opinion of the learned District Court and the counsel for the appellees, the term "carrier by railroad" includes express companies,

then the Commission has power to direct the American Railway Express Company to furnish cars to coal mines for loading and transportation of coal.

(13) The Commission is hereby authorized by general or special orders to require all *carriers by railroad* subject to this Act * * * to file with it from time to time their rules and regulations with respect to car service, * * *. (41 Stat. 476.)

(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by *carriers by railroad* subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle, * * *. (41 Stat. 476.)

(16) Whenever the Commission is of opinion that any *carrier by railroad* subject to this Act is for any reason unable to transport the traffic offered it so as properly to serve the public, it may * * * make just and reasonable directions * * *. (41 Stat. 477.)

(17) * * * It shall be the duty of all *carriers by railroad* subject to this Act, * * * to obey strictly and conform promptly to such orders or directions of the Commission as it may make under paragraphs (15) and (16). (41 Stat. 477.)

(18) After ninety days after this paragraph takes effect no *carrier by railroad* subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any

line of *railroad*, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of *railroad*, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity * * * (41 Stat. 477), and no *carrier by railroad* subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment (41 Stat. 477, 478).

(20) * * * From and after issuance of such certificate, and not before, the *carrier by railroad may*, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate (41 Stat. 478.)

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any *carrier by railroad* subject to this Act * * * to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines (41 Stat. 478).

Section 2 of the Interstate Commerce Act was amended by Section 404 of the Transportation Act (41 Stat. 479) and retains the term "any common carrier subject to the provisions of this Act."

Section 3 of the Interstate Commerce Act was amended by Section 405 of the Transportation Act (41 Stat. 479) and, curiously enough, provides:

> (2) From and after July 1, 1920, no *carrier by railroad subject to the provisions of this Act* shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid. * * * (41 Stat. 479.)

Section 3 is further amended by the provision "*All carriers* engaged in the transportation of passengers or property subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines," etc. (41 Stat. 479.)

Thus, in the same section there are used the terms "no *carrier by railroad* subject to the provisions of this Act" and "*all carriers,* engaged in the transportation of passengers or property subject to the provisions of this Act." This was deliberate.

Section 4 of the Interstate Commerce Act was amended by Section 406 of the Transportation Act (41 Stat. 480), and retains the words "That it shall be unlawful for any *common carrier subject to the provisions of this Act*" to charge, receive, etc. However, the second paragraph of Section 406 provides, "Wherever a *carrier by railroad* shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points it shall not be permitted to increase such

rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

It is quite clear that if Congress intended to include express companies the term "common carrier" would have been used.

Section 5 was amended by Section 407 of the Transportation Act, and retains the term (41 Stat. 480) "it shall be unlawful for any *common carrier subject to this Act*" to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, etc.

Paragraph (2) of Section 407 provides (41 Stat. 481) that "Whenever the Commission is of opinion, after hearing, upon application of any *carrier or carriers* engaged in the transportation of passengers or property subject to this Act," the acquisition of control of one carrier by another may be made subject to the control of the Commission.

Paragraph (4) provides for the preparation and adoption of plans for the consolidation of "the *railway properties* of the continental United States into a limited number of systems" (41 Stat. 481).

Paragraph (6) provides (41 Stat. 481) that "It shall be lawful for two or more *carriers by railroad*, subject to this Act" to consolidate their properties under certain circumstances and conditions in the Act provided.

Section 15 of the Interstate Commerce Act was amended by Section 418 of the Transportation Act (41 Stat. 485), but the terms "any common carrier or carriers subject to this Act for the transportation of persons or property" and "such carrier or carriers subject to the provisions of this Act" were retained. Section 15 relates to complaints before the Commission and provides that "whenever, after full hearing, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any *common carrier or carriers subject to this Act* for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such *carrier or carriers* subject to the provisions of this Act, is or will be unjust or unreasonable," etc., the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable rates.

For paragraphs (3) and (4) (41 Stat. 485), see *ante*, 1.

In paragraph (4) the Congress used the terms "carrier by railroad" and "the entire length of its railroad." In substance, the District Court held that the term "carrier by railroad" was the equivalent of the term "common carrier" as used in Section 400 of the Transportation Act amending Section 1 of the Interstate Commerce Act and as used in Section 1 of the Act of 1906. It is respectfully submitted that such interpretation is not only contrary to the whole

purpose and theory of the Interstate Commerce Act but is contrary to the clear terms and provisions thereof.

Section 15–a of the Interstate Commerce Act was added by Section 422 of the Transportation Act. By paragraph (1) thereof it provides that, "When used in this section the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto; the term 'carrier' means *a carrier by railroad*, or partly by railroad and partly by water within the continental United States, subject to this Act, excluding (a) sleeping car companies and *express companies* * * * (41 Stat. 488).

This was not a modification of the definition of "common carrier" as used in Section 1. It was the adoption of the term "carrier" and the definition thereof, which excluded express companies, for the purposes of the so-called guaranty, net return, and recapture of excess earnings clauses and for loans. The definition is limited solely to the purposes of Section 15–a.

Section 20, paragraph (5) thereof, of the Interstate Commerce Act, was amended by Section 435 of the Transportation Act and the amendment retained the term "*carriers* subject to the provisions of this Act" (41 Stat. 493).

Section 20–a was added to the Interstate Commerce Act by Section 439 of the Transportation Act and provides, "That as used in this section the term 'carrier' means a common *carrier by railroad* * * * which is subject to this Act, or any corporation or-

ganized for the purpose of engaging in *transportation by railroad* subject to this Act" (41 Stat. 494). The section relates to the issuance and the authority therefor of stocks, bonds, securities, obligations, and liabilities of railroad corporations.

Section 25 was added to the Interstate Commerce Act by Section 441 of the Transportation Act, and provides for the filing with the Commission of schedules of steamship companies showing rates and charges, ports, dates for receiving and loading of freight, dates of sailing, routes of vessels, and ports to which cargo will be carried. Paragraph (2) provides that, "Upon application of any shipper a *carrier by railroad* shall make request for, and the carrier by water shall upon receipt of such request name a specific rate applying for such sailing, and upon such commodity" (41 Stat. 497). Paragraph (2) further provides that, "The carrier by water, upon advices from a *carrier by railroad*, stating that the quoted rate is firmly accepted as applying upon a specifically named quantity of any commodity, shall, subject to such conditions as the Commission by regulation may prescribe, make firm reservation" for the space in the ship and shall so advise the carrier by railroad. The whole section clearly deals with rail and water transportation as the terms "carrier by railroad" and "rail transportation" are freely used.

Section 26 of the Interstate Commerce Act was added by Section 441 of the Transportation Act and provides that the Commission may, after inves-

tigation, "order any *carrier by railroad* subject to this Act" to install automatic train-stop or train-control devices or other safety devices (41 Stat. 498). Here is the use of the term "carrier by railroad" in connection with subjects which relate peculiarly to railroad equipment.

(6) OTHER ACTS TO REGULATE COMMERCE.

The Safety Appliance Act, March 2, 1893 (27 Stat. 531; 29 Stat. 85), (train brakes, automatic couplers, grab irons, and handholds) by Section 1 thereof, is directed to "any common carrier engaged in interstate commerce by railroad."

The Safety Appliance Act as amended (32 Stat. 943) "shall be held to apply to common carriers by railroads."

The Safety Appliance Act as amended (36 Stat. 298) (sill steps, hand brakes, ladders, running boards, and grab irons) "shall apply to every common carrier and every vehicle subject to the Act of March 2, 1893, as amended," *supra*.

The Accident Reports Act (36 Stat. 350) is directed to "the general manager, superintendent, or other proper officer of every common carrier engaged in interstate or foreign commerce by railroad."

The Hours of Service Act (34 Stat. 1415) is directed to "any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad."

The Ash Pan Act (35 Stat. 476) provides that "it shall be unlawful for any common carrier engaged in

interstate or foreign commerce by railroad to use any locomotive," etc.

The Transportation of Explosives Act (35 Stat. 1134; 41 Stat. 1444) discards the term "carrier by railroad" and uses the term "a common carrier engaged in interstate or foreign commerce," which includes express companies.

The Boiler Inspection Act (36 Stat. 913) applies to "any common carrier or carriers * * * by railroad."

The 28-Hour Law (34 Stat. 607) does not use the term "carrier by railroad," but the carriers to which the act shall apply are carefully enumerated, that is to say, "That no railroad, express company, car company, common carrier other than by water" shall confine, etc. The court will take judicial notice that livestock is shipped by express.

IV.

DECISIONS.

In *Wells Fargo & Company* v. *Taylor*, 254 U. S. 175, 187, this Court held that the term "every common carrier by railroad" as it appeared in the Employers' Liability Act excluded express companies. In delivering the unanimous opinion of the Court, Mr. Justice Van Devanter said:

> In our opinion the words "common carrier by railroad," as used in the act, mean one who operates a railroad as a means of carrying for the public; that is to say, a railroad company acting as a common carrier. This view not

only is in accord with the ordinary acceptation of the words but is enforced by the mention of cars, engines, track, roadbed, and other property pertaining to a going railroad (see *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 212–213); by the obvious reference in the latter part of Sections 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars, and other appliances intended to promote the safety of railroad employees (see *San Antonio & Aransas Pass Ry. Co.* v. *Wagner*, 241 U. S. 476, 484); by the use of similar words in closely related acts which apply only to carriers operating railroads, c. 196, 27 Stat. 531; c. 225, 35 Stat. 476; c. 208, 36 Stat. 350, and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown. 1 I. C. C. 349; *United States* v. *Morsman*, 42 Fed. Rep. 448; *Southern Indiana Express Co.* v. *United States Express Co.*, 88 Fed. Rep. 659, 662; s. c. 92 Fed. Rep. 1022. And see *American Express Co.* v. *United States*, 212 U. S. 522, 531, 534.

In *Express Rates, etc.*, 24 I. C. C. 380, the Commission pointed out the evils resulting from express companies retaining "possession of the shipment so as to receive the longest possible haul via their own lines," holding that "expedition is the very soul of the express business" (24 I. C. C. 392), and finding that "For the cure of this most annoying, and one of the most frequent, causes of complaint against the

express companies, they should be required forthwith to establish and jointly publish through routes between the principal points in the United States, which routes shall follow the main lines of travel, the most direct in point of time measured by the schedule of those passenger trains by which normal schedules are observed." (24 I. C. C. 393; Tr. 28.)

In *Express Rates, etc.*, 28 I. C. C. 131, decided July 24, 1913, the Commission stated that the block system of stating rates was admitted by the carriers to be practicable and satisfactory, and as a result of its investigation the Commission was convinced that if unbearable discrimination and confusion were to be avoided its order must take into account the entire body of rates for express service and that in this respect the express service was not radically different from the services performed by the railroads in the carriage of passengers and property, and was more precisely comparable with the service performed for the public by the Post Office Department (Tr. 28, 29).

It was the purpose to treat all express companies as a unit forming one national express system, to have express move over direct routes, and to make the same rate applicable thereto regardless of the route over which it moved. It was in the public interest for the express business to receive treatment similar to the mail service. Accordingly, because the American had worked out other reasonable routes is not a sufficient reason for permitting reasonable routes, in connection with the Southeastern, to be closed (Tr. 29).

If the term "carrier by railroad" includes express companies, then does not that term also include all of the facilities by which the express business is conducted; and would not the terms "water line," "interurban railway," and any other facilities by which express business is conducted similarly include express companies?

If the term "carrier by railroad" includes American Railway Express Company, then it likewise includes any express carriage by motor truck, motorcycle, electric railway, airplane, water line, or any other form which it may choose to select to carry and deliver the packages. Such a construction is obviously not only unreasonable but utterly impracticable.

In order to reach its conclusion the learned District Court was obliged to re-cast the carefully selected and continuously used words of the statute, thus (Tr. 124, 126) (293 Fed. Rep. 34, 36)—

> In the case of the Interstate Commerce Act, Congress, by an amendment of June 29, 1906, brought pipe-line carriers under the Act by the simple declaration that "the provisions of this Act shall apply" to them. But to bring express and sleeping-car companies within it, it proceeded to *define the term* "carrier" otherwise than it had been construed by the Commission. The enactment was that the term "Common carrier as used in this Act *shall include* express companies and sleeping-car companies." This was a legislative reversal

of previous construction, whether by Commission, courts, or public. Effect must be given to it by making the term include those companies whenever used in the Act and its amendments. By so doing the words of the first section must read "common carriers including express companies and sleeping-car companies engaged in the transportation of passengers or property wholly by railroad, etc." Thereby *such* express companies as carry *property by railroad* and *such* sleeping-car companies as carry passengers *by railroad*, and only such, are made subject to the Act. * * * We feel constrained to hold that "Carrier by railroad" by the dictionary of the Act means here just what it did when first used by the Act of 1906, to wit: "Common carrier including express and sleeping-car company, which carries by railroad."

* * * * *

The case, indeed, is not one of ordinary construction in which the reasonable intent of Congress is to be gathered from the context, but is rather one of executing a positive legislative mandate defining terms. The only question is whether the provision of the statute can have any reasonable application under these definitions, and we think it can. Since "carrier" wherever used in the Act means "common carrier" and since "common carrier as used in this Act shall include express and sleeping-car company," "Carrier by railroad" in paragraph 4, Section 15, must be read "Common carrier, including express and sleeping-car company, by railroad." And so read

> the provision can reasonably be applied to an express company, and its transportation arrangements with and over railroads, referred to as "lines" in the end of the paragraph under discussion.

This action of the District Court in thus re-casting the statute is assigned as reversible error (No. 666, Tr. 3).

V.

EXPRESS SERVICE AS DISTINGUISHED FROM CARRIER BY RAILROAD SERVICE.

Express service as conducted throughout the United States and the peculiar characteristics thereof were fully investigated and considered by the Commission more than 10 years ago in its investigation styled "*In Re Express Rates, Practices, Accounts, and Revenues,*" 24 I. C. C. 380. Commissioner Lane wrote an elaborate report covering 161 pages. That report was followed by another written by Commissioner Marble, 28 I. C. C. 132.

The several separate express companies operated under the terms and conditions prescribed by those reports until the consolidation, which was accomplished in order that there might be further uniformity in conducting the highly expedited express business.

If affirmed, the decree of the District Court will simply throw back progress which has been the result of many years of study and experiment on the part of both the Commission and the express carriers.

The order of the Commission was annulled on the ground that the Commission erred as a matter of

law in holding that American Railway Express Company was not a "carrier by railroad" within the meaning of that term as used in paragraph (4) of Section 15 of the Interstate Commerce Act.

The Government prevailed on all other questions raised and argued before the District Court and no cross-appeal was taken. *Peoria & Pekin Union Railroad Company* v. *United States*, decided January 7, 1924.

VI.

CONCLUSION.

The District Court clearly erred in thus annulling the order and it follows that its decree should be reversed.

JAMES M. BECK,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

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